

94-149

Nov 18 4 45 PM '94

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Petition of )

Nathan W. Garner and )  
Scholastic, Inc. )

Extension of the Commission's )  
Minority Tax Certificate Policies )  
to Minority-Controlled Video )  
Programmers )

File No. \_\_\_\_\_

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**PETITION FOR DECLARATORY RULING**

Mr. Nathan W. Garner and Scholastic, Inc.

("Petitioners"), by their attorneys, hereby petition the Commission to extend its minority tax certificate policy for the issuance of tax certificates under Section 1071 of the Internal Revenue Service ("IRS") to the qualified minority-controlled video programming entity described herein.

**I. Introduction**

Mr. Garner is an African-American with long standing experience in the video programming industry and a life-long interest in public education.<sup>1/</sup> For nearly 75 years, Scholastic

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<sup>1/</sup> Mr. Garner is a former public school teacher who was recruited to Scholastic Inc. in 1969 where he served for nine years as an editor and marketer of children's educational books. Mr. Garner has been a marketer of magazines at Time Inc.; he has headed Time Life Films and Preview Subscription Television. He was Vice President of Manhattan Cable TV, President of Paragon Cable, Manhattan and for the past six years Vice President of USA Network. In addition, during the Carter and Reagan Administrations, as a participant in the President's Executive Exchange Program, he served for a year as Special Assistant to the U.S. Secretary of Education and Executive Director of the Secretary's Task Force on Electronic Technology.

has been the nation's leading publisher of classroom magazines and educational children's books as well as a major school textbook publisher. Together, the Petitioners will develop an educational programming service controlled by Mr. Garner for use by multichannel video programming distributors ("MVPDs").<sup>2/</sup> This programming endeavor is intended to develop quality children's instructional television programming for distribution via the information superhighway to homes and classrooms throughout the United States.

The extension of the Commission's minority tax certificate policy to such a programming venture would facilitate the investment of start-up capital during the first year of operation. As shown herein, extension of the FCC's existing policies in this manner is consistent with prior Commission precedent, and would further the diversification policies mandated by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Moreover, application of the FCC's tax certificate policies to minority-controlled educational programmers would further the Commission's policies to improve the quantity and quality of children's educational television programming, and to distribute such programming to classrooms across the country.

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<sup>2/</sup> The organizational structure vesting control with Mr. Garner will be consistent with established Commission precedent. See, e.g., Liberty Cable Partners, File No. CSR-3848 (April 29, 1994).

## II. Existing Tax Certificate Policies

### A. Broadcast Radio and Television

In 1978, the Commission acknowledged that its then-existing program ascertainment rules and equal employment opportunity ("EEO") rules alone were insufficient to adequately represent the views of racial minorities in the broadcast media. To combat the problem, the FCC believed that "ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming."<sup>3/</sup> The Commission reasoned that diversified ownership of broadcast facilities would encourage diversified programming, "which is the key objective not only of the Communications Act of 1934 but also of the First Amendment." Id. Thus, based on First Amendment concerns generally, and Section 1071 of the tax code specifically,<sup>4/</sup> the FCC implemented a policy of issuing tax certificates to broadcast radio and television licensees where the sale of a broadcast property is proposed to parties with a controlling minority interest.

The Commission immediately recognized the broad authority it was afforded under Section 1071. In 1982, the FCC extended the policy to make tax certificates available to initial investors that provided "start-up" capital, during the first year of operation, and permitted the issuance of tax certificates to

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<sup>3/</sup> Statement of Policy on Minority Ownership of Broadcasting Facilities, "1978 Policy Statement", 68 F.C.C.2d 979, 981 (1978).

<sup>4/</sup> 26 U.S.C. §1071.

limited partnerships in which a minority general partner owned more than 20% of the equity and exercised control over the station's affairs.<sup>5/</sup> In doing so, the Commission observed that Section 1071:

confers broad jurisdictional powers upon the Commission, normally reserved to the Treasury, to issue tax certificates. . . . The Commission establishes policies in the first instance and makes the determination as to whether a particular transaction furthers a specific policy.<sup>6/</sup>

The Commission noted that it had already abandoned a strict construction of the statutory term "necessary or appropriate" as requiring a showing of involuntary divestiture, and had issued tax certificates in voluntary transactions since 1976.<sup>7/</sup> The fact that tax certificates could be "creative financing tools" which could "facilitate significantly minority entrepreneurs' access to necessary financing" was sufficient justification to extend the policy. Id.

#### **B. Cable Television**

In 1982, the Commission also extended its minority tax certificate policy to include cable television properties.<sup>8/</sup> The Commission found that cable operators perform functions

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<sup>5/</sup> Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 855-857 (1982).

<sup>6/</sup> Id. at 856.

<sup>7/</sup> Id. at 857, citing, In re Issuance of Tax Certificates, 59 F.C.C.2d 91 (1976).

<sup>8/</sup> Policy Statement on Minority Ownership of Cable Television Facilities, 52 R.R.2d 1469 (1982).

"similar to those performed by broadcast licensees for their respective audiences." Specifically, the FCC noted "cable television operators may exercise discretion in determining which broadcast and non-broadcast signals they will carry, as well as in selecting pay programming from alternative sources. Additionally, they may engage in program origination."<sup>2/</sup>

The FCC also recognized the possibility that "similar considerations may lead us in the future to extend this program to other services where licensees exercise significant editorial discretion over programming transmitted by their facilities."<sup>10/</sup> Programmers, which create and control and program content and distribute their programming via satellite and microwave facilities to MVPDs, are substantially similar in these functions to cable operators. The fact that a video programmer may not hold any licenses should not bar the Commission from applying its tax certificate policies to an otherwise qualified entity. While many cable television systems operate licensed microwave facilities, being a Commission licensee is not a requirement for the issuance of a tax certificate.

**C. Extension of the Tax Certificate Policy to  
Non-Broadcast Properties to Promote  
Competition**

Since the 1940s, the FCC has been concerned with the undue concentration of media control as evidenced by the duopoly rules and cross-ownership rules. Thus, in addition to furthering

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<sup>2/</sup> 52 R.R.2d at 1470.

<sup>10/</sup> Id. at n.17.

First Amendment principles of diversity of viewpoint, tax certificates have been employed by the Commission to further competition, discourage undue concentration of ownership, and promote new market entrants.<sup>11/</sup>

The Commission, ever cognizant of the changing nature of the telecommunications arena, has applied its tax certificate policies flexibly to accommodate changes in technology and to promote competition. The Commission's analysis in Telocator Network of America<sup>12/</sup> is instructive on this issue. There, Telocator petitioned the FCC to extend its tax certificate policy in connection with the sale or exchange of certain nonwireline cellular partnership interests. In part, the petition represented a "significant extension" of the Commission's prior precedent because it did not relate to the ownership or control of "radio broadcasting stations" specified in Section 1071.

Looking beyond the express language of Section 1071, the Commission found that the "promotion of a competitive market structure was the drafters' most immediate and principal concern."<sup>13/</sup> The Commission observed that "dramatic and substantial changes" in the telecommunications marketplace since the enactment of Section 1071 had occurred, specifically the transformation of the common carrier industry from a "natural

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<sup>11/</sup> See e.g., Issuance of Tax Certificates, 59 F.C.C.2d 91 (1976); Jefferson Standard Broadcasting Co. v. F.C.C., 305 F. Supp. 744 (D.C.N.C. 1969).

<sup>12/</sup> Telocator Network of America, 58 R.R.2d 1452 (1985).

<sup>13/</sup> Id. at 1448.

monopoly" into a competitive market structure.<sup>14/</sup> In such a marketplace, the Commission's tax certificate policies promoting competition could apply.<sup>15/</sup> Accordingly, the FCC found that the phrase "radio broadcasting station" is merely:

illustrative of the more general congressional intent to facilitate the effectuation of the Commission's policies rather than restrictive, and the scope of the phrase is properly construed as expanding with the extension of the Commission's pro-competitive policies.<sup>16/</sup>

Thus, the pro-competitive intent of Section 1071 and existing precedent, combined "with both the radical transformation of the telecommunications marketplace . . . and the substantial policy considerations favoring the issuance of the certificates" enabled the Commission to grant Telocator's petition.

Many of the Commission's observations in 1985 about the changing structure of the telecommunications market are equally applicable in 1994. Like the common carrier industry in the 1980s, the multichannel video distribution market today is evolving from a cable-based "natural monopoly" to a competitive market structure of competing distribution systems. The widespread deployment of fiber optics has significantly increased the channel capacity of cable television systems, fostering the development of new and diverse programming. It has also provided

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<sup>14/</sup> Id. at 1449.

<sup>15/</sup> Id., citing, Continental Telephone Corp., 43 F.C.C.2d 827, 838 (1973).

<sup>16/</sup> Id. at 1450.

telephone companies with the ability to provide video programming and compete directly with cable. Advances in technology which have created new outlets for the distribution of video programming, such as Direct Broadcast Satellite (DBS") and video dialtone, also have increased the demand for programming. These technological developments, combined with new statutory authority contained in the 1992 Cable Act, provide ample legal authority for the FCC to extend its tax certificate policies to minority controlled video programmers.

**III.        The 1992 Cable Act Provides Further  
Justification to Extend the Tax Certificate  
Policy to Qualified Programming Entities**

By 1992, Congress found the cable television industry, a nascent industry in the 1970s, to be "highly concentrated" and "vertically integrated."<sup>17/</sup> With 60% of all television households in the country subscribing to cable, the cable industry had the "dominant nationwide video medium."<sup>18/</sup> The 1992 Cable Act represents the legislative response to the growth of the cable television industry and the demand for greater access to programming by competing distribution systems. The statute entrusted the FCC with the obligations, among others, to: regulate the horizontal and vertical concentration of the industry; promote diversity of views; promote educational programming services; ensure all multichannel video program

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<sup>17/</sup> 1992 Cable Act, Section 2(a)(4) and (5).

<sup>18/</sup> Id., Section 2(a)(3).

distributors ("MVPDs") fair access to programming; and enforce tougher equal employment opportunity requirements on all MVPDs.

The scope of the 1992 Cable Act reaches well beyond the regulation of cable television systems. It extended the FCC's jurisdiction in many areas over all multichannel video programming distributors ("MVPDs").<sup>19/</sup> For example, non-licensed entities not formerly within the FCC's jurisdiction, such as television receive-only satellite program distributors, are now subject to EEO requirements. One impact of the 1992 Cable Act is that programming services distributed by MVPDs, such as the educational programming service contemplated by Petitioners, are subject to the FCC's diversification and pro-competitive policies. As a result, such minority-controlled programming services should be eligible for tax certificates. See, Telocator, supra.

#### **A. Educational Must-Carry Requirements**

Among the Congressional findings of the 1992 Cable Act is that "public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." Section 2(a)(8)(A), 1992 Cable Act. This led to the requirement

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<sup>19/</sup> The 1992 Cable Act defines "MVPDs" as "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522 (12).

that cable systems "must-carry" between one and three educational stations. 47 U.S.C. §535.

Using tax certificates as a vehicle to encourage the development of educational programming for distribution by both broadcast stations and MVPDs would further the public interests in ensuring universal access to educational programming. As discussed in Section V, infra, applying the tax certificate policy to qualified programmers would also further the objectives of the Children's Television Act by providing economic incentives for developing and distributing quality educational and informational programming over the information superhighway.

#### **B. Horizontal and Vertical Ownership Limits**

Sections 11 and 13 of the 1992 Cable Act required the FCC to establish, among other things, horizontal ownership limits, and vertical subscriber limits and channel occupancy limits in order to promote diversity of viewpoint.<sup>20/</sup> Concerned that some multiple system operators ("MSOs") were able to "exercise excessive market power in the program acquisition market," Congress adopted horizontal and vertical ownership restrictions "to prevent large, vertically integrated cable systems from creating barriers to entry for new video programmers

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<sup>20/</sup> 47 U.S.C. § 533; Implementation of Sections 11 and 13 of the Cable television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, MM Docket No. 92-264, FCC 93-332 (released July 23, 1993) ("First Report & Order"); Second Report & Order, 8 FCC Rcd. 8565 (1993).

and from causing a reduction in the number of media voices available to consumers."<sup>21/</sup>

Accordingly, the FCC adopted a national subscriber limit of 30% of all homes passed,<sup>22/</sup> and a 40% limit on the number of channels that could be occupied on a vertically integrated cable system by video programmers in which a cable operator has an attributable interest.<sup>23/</sup> Significantly, the FCC allowed an increased national subscriber limit of 35% provided that the additional systems above 30% were minority-controlled, and allowed carriage of vertically integrated programming services on two additional channels or up to 45% of a cable system's capacity, whichever is greater, as long as the additional channels are minority-controlled.<sup>24/</sup> In doing so, the FCC explained that:

the Commission has long recognized that the public interest is enhanced when cable programming reflects a diversity of viewpoints. We believe that allowing such expanded carriage of minority-controlled video programming services will encourage additional MSO investment in minority-owned programming services, which will in turn promote minority ownership of video programming services and increase the

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<sup>21/</sup> Second Report & Order, 8 FCC Rcd. at 8570.

<sup>22/</sup> The horizontal ownership limits were stayed by federal District Court in Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 16, 1993).

<sup>23/</sup> See, 47 C.F.R. §§76.503, 76.504.

<sup>24/</sup> Second Report & Order, 8 FCC Rcd. at 8567.

diversity of viewpoints presented to cable subscribers.<sup>25/</sup>

The intent of these provisions is to encourage the minority ownership of video programming services and to promote new market entrants. Extension of the tax certificate policy to such minority-controlled programming services would further this policy.

### C. Commercial Leased Access Rules

Since 1984, cable operators have been required to set-aside up to 15% of the activated cable channels for leased commercial access by non-affiliated programmers. The purpose of the leased access rule is "to assure that the widest possible diversity of information sources are made available to the public from cable systems."<sup>26/</sup> The 1992 Cable Act amended the statute to allow cable operators to use up to 33% of their leased access set-aside for "the provision of programming from a qualified minority programming source or from any qualified educational programming source whether or not such source is affiliated with the cable operator."<sup>27/</sup>

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<sup>25/</sup> Id. at 8596. The FCC specifically declined to extend this policy to "minority-oriented" programming, noting the "constitutional difficulties" associated with content regulation. Id., citing, Metro Broadcasting v. F.C.C., 110 S.Ct. 2997, 3019, n.36 (1990).

<sup>26/</sup> 47 U.S.C. §532. As the House Report on the 1984 Cable Act states: "Section 612 establishes a scheme to assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public." House Report 98-934, p.160.

<sup>27/</sup> 47 U.S.C. §532(i)(1).

It is clear from the express language of Section 532 that Congress intended to stimulate minority ownership of video programming services and promote the development of educational programming. The fact that minorities own and control virtually no national video programming networks is not in the public interest, a problem which Congress has tried to alleviate. To the best of our knowledge, of more than one hundred and seven (107) national cable programming networks identified in the Commission's First Report on the status of competition in the video programming delivery market,<sup>28/</sup> only Black Entertainment Television ("BET") is controlled by a minority entity. Again, the use of minority tax certificates to encourage investment in new program services, particularly educational programming, would further the express intent of Section 532.

#### **D. Equal Employment Opportunity Regulations**

The 1992 Cable Act strengthened the FCC's existing equal employment opportunity ("EEO") rules applicable to television broadcast licensees and cable operators, and extended EEO requirements to all MVPDs.<sup>29/</sup> In implementing this section of the 1992 Cable Act, the FCC applied the EEO requirements not only to MVPDs, but also to customer-programmers of Direct

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<sup>28/</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 94-235, CS Docket No. 94-48, Appendix G, Tables 3 and 4 (September 28, 1994).

<sup>29/</sup> 47 U.S.C. § 554. Congress had observed that the FCC's existing regulations failed to achieve minority employment "in significant numbers in positions of management authority in the cable and broadcast television industries." Section 22(a)(1), 1992 Cable Act.

Broadcast Satellites which exercise editorial control, as well as to programmers offering six or more channels of "commonly-owned" programming.<sup>30/</sup> The extension of the EEO requirements to certain programmers in particular demonstrates the Commission's acknowledgment that programming services are an integral part of the multichannel video marketplace and the proper subject of the Commission's diversification policies.

In spite of stronger EEO requirements, the Commission has acknowledged it has not yet met the goal of ensuring adequate minority representation in the employment and ownership of the telecommunication industry. Minorities are still "seriously underrepresented in the ownership of telecommunications businesses."<sup>31/</sup> In examining the record, Chairman Hundt has observed: (1) there are only 490 minority-owned telecommunications firms of approximately 98,000; (2) of 10,000 commercial broadcast stations, there are only 300 that are minority-controlled; (3) out of 7,500 cable operators, only 9 are minority-controlled; and (4) of nearly 1,700 electronic computing equipment manufacturers, only one is owned by an African-American. Id. Citing these statistics to Congress, Chairman Hundt reiterated the "fundamental obligation of both Congress and

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<sup>30/</sup> Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities., 8 FCC Rcd. 5389, 5398-99 (1993).

<sup>31/</sup> Statement of FCC Chairman Reed E. Hundt before the National Urban League Conference, July 26, 1994.

the FCC to examine new and creative ways to ensure minority opportunity."<sup>32/</sup>

**IV.            Extension of Tax Certificate Authority to  
Minority-Controlled Programmers**

The Commission's tax certificate policies, extended to video program services, would be one "new and creative way to ensure minority opportunity." As demonstrated by the foregoing 1992 Cable Act provisions, Congress significantly extended the FCC's authority, directly and indirectly, over video programmers in order to encourage diversity of ownership and viewpoint. Application of the Commission's tax certificate policies to all minority-controlled, video programmers would further minority participation in one of the most fundamental segments of the telecommunications industry without engaging in content regulation. It would stimulate investment in minority-controlled programmers outside of highly concentrated cable television industry, and would create competition in the programming industry itself by promoting new market entrants. It would alleviate the existing inequity of minority representation in the video programming market, and would further the goal of diversity of viewpoint through the diverse ownership of video programmers.

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<sup>32/</sup> Statement of Reed E. Hundt, Chairman, Federal Communications Commission before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance and Urban Development, May 20, 1994.

Such a policy is consistent with the legislative purposes and goals of the 1992 Cable Act, and prior Commission precedent.<sup>33/</sup>

V.           **Extending the Tax Certificate Policy to Minority  
Controlled Educational Programmers Also Would  
Further the Purpose of the Children's Television  
Act**

When Congress enacted the Children's Television Act of 1990 ("CTA"), it intended to increase the amount of educational and informational television programming available to children and to protect children from the over-commercialization of programming. Congress found that "by the time the average child is 18 years old, he or she has spent between 10,000 and 15,000 hours watching television."<sup>34/</sup> Because of the "influential role television plays in a child's life, Congress has historically concerned itself with the nature of television programming and its effect upon the young audience." Id.

Pursuant to the CTA, the FCC adopted regulations in 1991.<sup>35/</sup> However, by 1993, the Commission issued a Notice of Inquiry seeking comment on ways to better improve the level of

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<sup>33/</sup> Apart from the 1992 Cable Act, the Omnibus Budget Reconciliation Act of 1992 ("Budget Act") demonstrates a new, broader national policy to promote competition and diversification in the telecommunications market, and specifically employs tax certificates as a vehicle to do so. 47 U.S.C. § 309(j)(4)(D). The FCC has also used tax certificates to encourage fixed microwave operators to relocate from spectrum allocated to emerging technologies. See, Third Report & Order, 8 FCC Rcd. 6589 (1993).

<sup>34/</sup> House Committee on Energy and Commerce, H.R. Rep. No. 101-385, 101st Cong., 2d. Sess. (1990) at p.5.

<sup>35/</sup> Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd. 2111, recon. granted in part, 6 FCC Rcd. 5093 (1991).

informational and educational programming.<sup>36/</sup> Comparing recent renewal applications with the legislative history of the CTA, the FCC observed that "the number of hours and time slots devoted to children's programming do not appear to have substantially changed."<sup>37/</sup> The Commission stated that "[w]e do not believe that this level of performance is, in the long term, consistent with the objectives underlying the CTA."<sup>38/</sup> Recognizing its obligation to meet the goals of the CTA, the FCC held en banc hearings on children's programming in May, 1994.

Both Congress and the Commission have recognized that the existing level of instructional, educational and information programming provided by broadcast licensees and cable television operators is not sufficient to meet the needs of our national's children. Not only must additional quality educational programming be developed, it must also be distributed nationally to homes and classrooms if these goals are to be met.

The Administration has repeatedly emphasized that access to the information superhighway must be universal so that

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<sup>36/</sup> Policies and Rules Concerning Children's Television Programming, Notice of Inquiry, 8 FCC Rcd. 1841 (1993).

<sup>37/</sup> The Commission also appeared distressed that some broadcasters attempted to demonstrate that programs such as "The Flintstones" and "G.I. Joe" satisfied their CTA obligations because they included a variety of "generalized pro-social themes." Id. at 1842.

<sup>38/</sup> Id. As Representative Edward J. Markey (D-Mass.), present Chairman of the House Subcommittee on Telecommunications and Finance has observed, "[w]ith a few notable exceptions, children's programming remains the equivalent of a trip to Toys R Us." Edward Markey, "Broadcasters and America's Children," Broadcasting & Cable Magazine, July 25, 1994, p.77.

we do not create a society of information "haves" and "have nots."<sup>39/</sup> The nation's goal of improving the quality and availability of educational programming could be furthered by the extension of the Commission's tax certificate policies to minority-controlled educational programmers. While the Commission is considering strengthening its rules to require broadcasters, as a condition of license renewal, to improve the quantity and quality of children's programming, the CTA does not specifically give the Commission authority to impose such quantitative guidelines for additional educational programming on cable television operators or other MVPDs. However, consistent with its already broad authority to issue tax certificates, there are no legal obstacles to issuing tax certificates to minority controlled educational programmers that provide programming to meet the objectives of the CTA.

#### VI. Conclusion

The central purpose of the 1992 Cable Act is the promotion of diversity of viewpoint and competition in the delivery of video programming services. The purpose of the CTA is to increase the quantity and quality of children's television

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<sup>39/</sup> Congress is already working on ways to encourage the development of distribution systems to deliver educational programming. For example, in 1992, Congress appropriated over \$1.1 billion to the Corporation for Public Broadcasting ("CPB") to study and develop proposals for "quality interactive instructional programming" and the utilization of "distance learning" through the interconnection of public schools to advanced delivery systems. Public Telecommunications Act of 1992, Sections 17 and 18, U.S.C.C.A.N. 102d Cong. 2d Sess. (1992), 106 STAT 954-55.

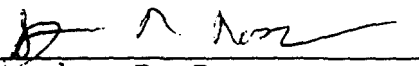
programming, and to make educational programming available through the information superhighway. Both Congress and the FCC have recognized that existing policies alone are not enough meet these goals and additional measures are necessary.

The tax certificate policy is the perfect vehicle to accomplish the goals enunciated above. The Commission has the broad authority under that policy to provide incentives for investment in minority-controlled programming entities, particularly when the nature of the programming is educational.

For the foregoing reasons, Petitioners respectfully request that the Commission issue a Declaratory Ruling extending its tax certificate policies to the minority-controlled, educational programming service being developed by Mr. Garner in conjunction with Scholastic, Inc.

Respectfully submitted,

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Dated: November 18, 1994